STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 10, 2011
v	No. 295663 Wayne Circuit Court
PEDRO ENRIQUE FALCON-FUENTES, Defendant-Appellant.	LC No. 09-006103-01

Before: MURPHY, C.J., AND STEPHENS AND M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 15 to 40 years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant argues that the trial court abused its discretion when it denied defendant's motion to adjourn. Specially, defendant asserts that he was denied his right to prepare a meaningful defense because he did not receive Trooper Reinhard Pope's ballistics report, William Steiner's gunshot residue test findings, or the Detroit Police Department's progress notes regarding the missing surveillance video from Vincente's Cuban Cuisine (hereinafter, "the bar") until the week before trial. We disagree. This Court reviews for an abuse of discretion the trial court's decision to grant or deny an adjournment. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

Pursuant to MCR 2.503(B)(1), a motion to adjourn must be based on good cause. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). The factors used in determining good cause are: (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the constitutional right, (3) whether the defendant was negligent in asserting his right, and (4) whether the defendant had requested previous adjournments. *Id*. Even if a defendant demonstrates good cause, "the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion." *Id*. at 18-19, citing *People v Snider*, 239 Mich App 393, 421-422; 608 NW2d 502 (2000).

A defendant has a constitutional right to present a defense. *Wash v Tex*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967); *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). Where a defendant is able to present his theory of the case through other evidence, evidentiary errors do not necessarily rise to the level of a constitutional error. *People v Steele*, 283 Mich App 472, 488-489; 769 NW2d 256 (2009).

A review of the record reveals that each of defense counsel's concerns were effectively addressed by the trial court. At trial, defense counsel vigorously cross-examined Steiner regarding the gunshot residue test results and Sergeant Ron Gibson regarding the missing surveillance video and hard drive. Defense counsel was also able to thoroughly cross-examine Pope regarding his ballistics report. Additionally, defense counsel's closing argument highlighted the inconsistencies and lack of evidence in the prosecution's case. Thus, defendant has failed to show good cause for granting an adjournment. Defense counsel demonstrated that he was adequately prepared and able to thoroughly cross-examine the witnesses regarding the evidence. Defendant's rights were sufficiently protected; therefore, the trial court did not abuse its discretion in denying defendant's motion for adjournment.

Furthermore, regardless of whether defendant showed good, defendant has failed to show that the outcome of the trial would have been different even if defense counsel was given more time to prepare the defense. Counsel received the ballistics and gunshot residue reports and the police progress notes the week before trial. At trial, defense counsel was well-prepared and he effectively cross-examined Pope, Steiner, and Gibson regarding the evidence. Thus, defendant was able to present his defense theory and has failed to show actual prejudice resulting from the trial court's denial of his motion for adjournment.

Defendant next argues that the prosecution failed to offer sufficient evidence in support of his convictions where that evidence was insufficient to prove he was the shooter. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). In reviewing the sufficiency of the evidence, this Court "must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

The elements of second-degree murder are (1) a death, (2) the defendant's act caused the death, (3) the defendant acted with malice, and (4) the defendant acted without justification or excuse. MCL 750.317; *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). The intent necessary to satisfy the crime of second-degree murder is the intent to kill, the intent to inflict great bodily harm, or the willful and wanton disregard for whether death will result. *People v Robinson*, 475 Mich 1, 14; 715 NW2d 44 (2006). The elements of felony-firearm are: (1) the defendant possessed a firearm (2) during the commission or attempted commission of a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Furthermore, identity is an essential element of every crime. *Yost*, 278 Mich App at 356, citing *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The prosecution must present sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crimes alleged. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

In reviewing the record in the light most favorable to the prosecution, a rational trier of fact could find that there was sufficient evidence to prove beyond a reasonable doubt that defendant was the shooter. Antoine Howard testified that he saw defendant shoot the victim at the bar's front door. This testimony alone is sufficient to uphold defendant's convictions. See *People v Malone*, 193 Mich App 366, 372; 483 NW2d 470 (1992), aff'd 445 Mich 369 (1994) (a witness's testimony can provide sufficient evidence to justify a conviction). Furthermore, a prosecutor is not required to present direct evidence linking a defendant to a crime in order to establish sufficient evidence to sustain a conviction. Rather, "[c]ircumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense." *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). Here, the prosecution presented the testimony of Rebecca Tejada, Rafael Soto, Luis Gomez, Lamon Burnett, Howard, and Brian Flewallen, all of whom testified that shortly before the victim was shot, he and defendant got into an argument and defendant was escorted out of the bar. Furthermore, Flewallen and Howard testified that immediately after the gunfire ceased they saw defendant running from the bar. "[E]vidence of flight is admissible to support an inference of 'consciousness of guilt' and the term 'flight' includes such actions as fleeing the scene of the crime." *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008), quoting *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Finally, although Tejada, Soto, Howard and Flewallen each gave a different description of defendant's clothing and/or hairstyle, Tejada and Soto affirmatively testified that they recognized defendant's face as the man they saw the victim argue with and Howard and Flewallen affirmatively testified that they recognized defendant's face as the shooter. This evidence was sufficient to prove defendant's identity beyond a reasonable doubt. *Yost*, 278 Mich App at 356. Therefore the evidence is sufficient to uphold defendant's convictions.

Defendant's assertion that the prosecution failed to present credible identification evidence fails because "[q]uestions of credibility are left to the trier of fact and will not be resolved anew by this Court." *Avant*, 235 Mich App at 506. Rather, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Thus, the prosecution offered sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that defendant was the shooter.

Next, defendant argues that the trial court erred in instructing the jury that the entire trial transcript was not available. We disagree. We review unpreserved jury instruction errors for plain error affecting a defendant's substantial rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). The decision regarding whether to allow the jury to rehear testimony is discretionary and rests with the trial court. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000). MCR 6.414(J) provides:

> [i]f, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

At 9:06 a.m., shortly after the jury began deliberations, the jury sent a note to the trial court requesting the trial exhibits, the jury instructions, and the trial transcript. Thereafter, the trial court informed both parties that it had provided the jury with the trial exhibits and the jury instructions, but, regarding the requested trial transcript, the trial court stated that there was no trial transcript available. The trial court advised the jury to use its collective memory to recall testimony from trial.

The trial court did not commit plain error in denying the jury's request for the entire transcript at the beginning of deliberations. MCR 6.414(J) precludes the trial court from refusing a *reasonable* request of *certain* testimony. Here, the jury's request for all trial transcripts approximately six minutes into deliberations was unreasonable and it was not plain error for the trial court to use its discretion in denying the request. See *People v Holmes*, 482 Mich 1105; 758 NW2d 262 (2008) (the trial court did not violate MCR 6.414(J) when it denied the jury's request to see the *entire* trial transcript). Furthermore, contrary to defendant's assertions, MCR 6.414(J) does not mandate that the trial court inform the jury that it must make specific requests if the jury asks to see all trial transcripts. Rather, the court rule allows the trial court to exercise its discretion and the only limitation on the trial court's discretion is that the trial court may not refuse a reasonable request of certain trial testimony. Finally, the trial court did not foreclose the possibility of having the transcript reviewed at a later time when it ordered the jury to rely on its collective memory. Defendant has failed to show that the trial court abused its discretion.

Defendant further argues that his right to present a defense, to confrontation, and to a fair trial were violated by the trial court's refusal to allow defense counsel to recall Tejada and Officer Latesha Jones to question them regarding whether defendant had a ponytail on the night of the shooting. We disagree. We review unpreserved issues for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

As previously noted, a defendant has a constitutional right to present a defense. *Wash*, 388 US at 19; *Yost*, 278 Mich App at 379. However, the right is not absolute, and a defendant must still comply with "'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Yost*, 278 Mich App at 379, quoting *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). Thus, the right to present a defense "extends only to relevant and admissible evidence." *People v Likine*, 288 Mich App 648, 658; ___ NW2d___ (2010), citing *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984).

The Confrontation Clause requires: "(1) physical presence, (2) an oath, (3) cross-examination, and (4) 'observation of demeanor by the trier of fact[.]'" *People v Buie*, 285 Mich App 401, 408; 775 NW2d 817 (2009), quoting *Md v Craig*, 497 US 836, 846; 110 S Ct 3157; 111 L Ed 2d 666 (1990). "The right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of the trial process or of society . . . . Defendants are, however, guaranteed a reasonable opportunity to test the truth of a witness' testimony." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

Criminal defendants have a constitutional right to a fair and impartial trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). Trial courts have wide discretion and power regarding matters of trial conduct; however, that power is not without limits. *Conley*, 270 Mich App at 307-308. The scope of cross-examination is discretionary with the trial court, but "that discretion must be exercised with due regard for a defendant's constitutional rights." *People v Holliday*, 144 Mich App 560, 566; 376 NW2d 154 (1985). However, defendants are not entitled to unlimited cross-examination. *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998). The right to cross-examination does not extend to irrelevant issues and may be overridden by other legitimate interests. *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982).

To begin, we note that Jones did not testify at trial. Because Jones did not testify, defendant fails to show plain error regarding the recalling of Jones. We note that at trial, defense counsel did request the recalling of Tejada and Soto. However, because defendant's brief does not address Soto, we consider this issue abandoned, and decline to address it. See generally *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004) ("The failure to brief the merits of an allegation of error constitutes an abandonment of the issue.").

Regarding Tejada, as noted by the trial court, defense counsel had ample opportunity to cross-examine her. In addition, defense counsel was aware from Flewallen's statement before trial that there was a possibility that Flewallen would testify that he saw someone with a ponytail running away from the bar. Thus, defense counsel had the ability to effectively question Tejada on this issue. Plain error did not occur when the trial court denied defense counsel's request to recall Tejada because defendant was able to present a defense, confront the witnesses, and have a fair trial.

Finally, defendant argues the jury verdict form was improper. We disagree. Claims of instructional error are reviewed de novo. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "[A] criminal defendant is deprived of his constitutional right to a jury trial when the jury is not given the opportunity to return a general verdict of not guilty" because a defendant is "'entitled to have a properly instructed jury consider the evidence against him.'" *People v Wade*, 283 Mich App 462, 467; 771 NW2d 447 (2009), quoting *People v Hawthorne*, 474 Mich 174, 182; 713 NW2d 724 (2006).

Defendant's assertion that *Wade* requires reversal in this case is incorrect because a review of both the facts and the jury verdict form used in *Wade* highlights that defendant's case is distinguishable from *Wade*. In *Wade*, the jury verdict form did not allow for the jury to select a general "not guilty" verdict. Also, in *Wade*, the trial court's instructions and the jury foreperson's reading of the jury verdict form indicated that the jury was confused regarding its options in completing the jury verdict form. *Wade*, 283 Mich App at 465-468.

In this case, the jury verdict form given to the jury stated, "COUNT 1: Homicide – First Degree Murder – Premeditated" and underneath count 1 the jury could check one of the following options: (1) "NOT GUILTY" or (2) "GUILTY Homicide – First Degree Murder – Premeditated" or (3) "GUILTY of the lesser included charged Homicide – Second Degree Murder" or (4) "GUILTY of the lesser included charge Voluntary Manslaughter[.]"

In reviewing the jury verdict form, it is clear that the jury verdict form specifically allowed the jury to select a general "not guilty" verdict regarding the first-degree murder charge. In addition, the trial court provided the jury with straightforward and comprehendible jury instructions that were almost verbatim from CJI2d 3.11 regarding how the jury was to approach its decision regarding the first-degree murder charge. These jury instructions included a clearly articulated explanation that if the jury found defendant not guilty of first-degree murder, not guilty of second-degree murder, and not guilty of voluntary manslaughter, they should return a general verdict of "not guilty" regarding the first-degree murder charge. Thus, the jury instructions and the jury verdict form fairly presented the issues to be tried and sufficiently protected defendant's rights.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly